

ENGINEERS CONSTRUCTORS, INC.

and

Case 26--CA--10476

LABORERS' INTERNATIONAL UNION OF NORTH
AMERICA, LOCAL NO. 1441, AFL--CIO

DECISION AND ORDER

Upon a charge filed by the Union 1 November 1983, the General Counsel of the National Labor Relations Board issued a complaint on 4 November 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 23 August 1983, following a Board election in Case 26--RC--6592, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "'record'" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); Frontier Hotel, 265 NLRB No. 46 (Nov. 9, 1982).) The complaint further alleges that since 24 October 1983 the Company has refused to bargain with the Union. On 21 November 1983 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 8 December 1983 the General Counsel filed a Motion for Summary Judgment. On 13 December 1983 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

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The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint, the Company admits that the Union was certified as the exclusive collective-bargaining representative of the unit employees, and it admits that it has refused the Union's request to bargain. However, the Company denies that the unit is appropriate for collective-bargaining purposes. In its response to the General Counsel's motion for summary judgment, the Company asserts that the Acting Regional Director's Decision and Direction of Election in Case 26--RC--6592 was incorrect, and that an election should not have been conducted because of the contracting nature of the unit. The Company contends that a hearing is necessary to establish that the construction job on which it is presently working will be completed on 15 March 1984. The Company also contends that the case is moot and that the complaint should be dismissed because the job is nearly completed. The General Counsel contends that the Company seeks to relitigate issues previously considered in the underlying representation proceeding.

Our review of the record herein, including the record in Case 26--RC--6592, discloses that on 1 July 1983 the Acting Regional Director of Region 26 issued a Decision and Direction of Election, which rejected the Company's contention that the petitioned-for unit was a contracting unit. On 13 July 1983 the Company filed a request for review of the Decision and Direction of Election. The Company contended as it does here that its construction project would be completed by 15 March 1984, and that the unit was unstable and contracting in nature. The Board denied the Company's request for review on 27 July 1983.

An election was conducted among the employees in the unit found appropriate on 29 July 1983. The tally of ballots showed that 25 votes were cast for and 3 against the Union, with 8 nondeterminative challenged ballots. The Company filed objections and a motion to dismiss the petition on 5 August 1983, and on 23 August 1983 the Regional Director issued a Supplemental Decision and Certification of Representative, in which he overruled the Company's objections. The Company filed a request for review of the Regional Director's supplemental decision on 2 September 1983, and on 5 October 1983 the Board denied the request for review.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See Pittsburgh Glass Co. v. NLRB, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Company, a Tennessee corporation, is engaged as a general contractor in the building and construction industry at its facility in Memphis, Tennessee, where it annually purchases and receives products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Tennessee. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held on 29 July 1983, the Union was certified on 23 August 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

All construction and general laborers and all other employees employed in a laborer's classification at the Company's jobsite located at 4001 Airways Boulevard, Memphis, Tennessee, excluding all other employees, including office clerical, technical, professional employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since 26 September 1983 the Union has requested the Company to bargain, and since 24 October 1983 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

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Conclusions of Law

By refusing on and after 24 October 1983 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Engineers Constructors, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Laborers' International Union of North America, Local No. 1441, AFL--CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All construction and general laborers and all other employees employed in a laborer's classification at the Company's jobsite located at 4001 Airways Boulevard, Memphis, Tennessee, excluding all other employees, including office clerical, technical, professional employees, guards, and supervisors as defined in the Act.

(b) Post at its facility in Memphis, Tennessee, copies of the attached notice marked "'Appendix.'"¹ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

¹ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "'POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'" shall read "'POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.'"

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C.

30 April 1984

Donald L. Dotson, Chairman

Don A. Zimmerman, Member

Patricia Diaz Dennis, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Laborers' International Union of North America, Local No. 1441, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All construction and general laborers and all other employees employed in a laborer's classification at the Company's jobsite located at 4001 Airways Boulevard, Memphis, Tennessee, excluding all other employees, including office clerical, technical, professional employees, guards, and supervisors as defined in the Act.

ENGINEERS CONSTRUCTORS, INC.

(Employer)

Dated ----- By -----
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Mid-Memphis Tower Building, Suite 800, 1407 Union Avenue, P.O. Box 41559, Memphis, Tennessee 38174, Telephone 901--521--2687.